Supreme Court, U.S.
FILED
MAY 3 2002
CLERK

No. 01-1247

IN THE

Supreme Court of the United States

STATE OF WISCONSIN,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY,
CHRISTIE WHITMAN, and
SOKAOGON CHIPPEWA COMMUNITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF FIDELITY EXPLORATION & PRODUCTION COMPANY

JON METROPOULOS *
GOUGH, SHANAHAN,
JOHNSON & WATERMAN
P. O. Box 1715
Helena, MT 59624
(406) 442-8560

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
A. FIDELITY EXPLORATION & PRODUCTION COMPANY	1
B. EXPLANATION OF *AMICUS* INTEREST	2
1. Development of CBNG	2
2. Northern Cheyenne Tribe CBNG Water Quality Regulations	4
SUMMARY OF ARGUMENT	6
ARGUMENT	8
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	Page
Atkinson Trading Co. Inc. v. Shirley, 532 U.S. 645 (2001)	7
City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997)	5
County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992)	7
Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998)	5
Montana v. United States, 450 U.S. 544 (1981)	5, 6, 7, 9, 10, 11
Nevada v. Hicks, ___U.S. ___, 121 S. Ct. 2304 (2001)	7
Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845)	6
South Dakota v. Bourland, 508 U.S. 679 (1993)	7
Strate v. A-1 Contractors, 520 U.S. 438 (1997)	7
United States v. Holt State Bank, 270 U.S. 49, 55 1926)	6

FEDERAL REGULATIONS AND STATUTES	
33 U.S.C. §§ 1251, *et seq*	5
40 C.F.R. §§ 131.3-131.9 (1996)	5
56 Fed. Reg. 64, 876 *et seq.*	5

OTHER AUTHORITIES	
Article II, Section 1, Montana Constitution (1972)	7
Exec. Or., March 19, 1900	4

TABLE OF AUTHORITIES—Continued

Page

Nakashima, E., Interior Official Challenges EPA Report on Energy Site, Washington Post, April 25, 2002, at A27 2

Coal Bed Methane Development, Powder River Basin of Montana: Economic and Social Impacts of Proposed Development, prepared by Anderson ZurMuehlen & Co., P.C., March 30, 2001 9

IN THE

Supreme Court of the United States

No. 01-1247

STATE OF WISCONSIN,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
CHRISTIE WHITMAN, and
SOKAOGON CHIPPEWA COMMUNITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF FIDELITY EXPLORATION & PRODUCTION COMPANY

INTEREST OF *AMICUS CURIAE* [1]

A. FIDELITY EXPLORATION & PRODUCTION COMPANY

Fidelity Exploration & Production Company ("Fidelity") is a coal bed natural gas ("CBNG") exploration, development

[1] No person or entity other than the named *amicus curiae* and their counsel have made monetary contributions towards this brief, and no counsel for any party played any role in the preparation of the brief. The *amicus curiae* have filed with the Clerk of the Court the consents of counsel for petitioners and respondents to file this brief.

and marketing company with large fee land and state and federal lease holdings in the Powder River Basin in southeast Montana and northeast Wyoming. It is a subsidiary of Montana Dakota Utilities Resources, headquartered in Bismarck, North Dakota.

B. EXPLANATION OF *AMICUS* INTEREST

1. Development of CBNG

The Powder River Basin contains vast reserves of CBNG which now figure prominently in the national energy policy, and therefore the security plans, of the United States. *Nakashima, E., Interior Official Challenges EPA Report on Energy Site,* Washington Post, April 25, 2002, at A27: "the nation's largest domestic energy exploration project. . . .the Powder River Basin's coal bed methane gas project has become a crucial part of the Bush administration's energy plan." CBNG in the Powder River Basin is an extremely clean and abundant source of fuel, requiring very little modification after its extraction from coal seams prior to introduction into the nation's natural gas pipeline system.

Fidelity owns producing CBNG wells in Montana and Wyoming situated upstream, that is South, of the Northern Cheyenne Reservation ("Reservation") in the Tongue River basin, a part of the Powder River Basin. After the completion of ongoing environmental review processes by the federal government, the State of Montana and the State of Wyoming and adoption of indicated protection and mitigation measures, Fidelity plans to further develop its fee land and leasehold property interests by drilling thousands more CBNG wells.[2]

---

[2] Fidelity is not alone in its ownership of CBNG mineral rights in the Powder River Basin. Across sixteen counties of Montana and more in Wyoming and encompassing hundreds of thousands of acres of fee-owned land and state and federal leases, numerous other energy companies, some

CBNG is produced by drilling small-footprint wells, eventually housed in a dun-colored box about the size of a large dog house, 100 to 300 feet into the earth to the first or second level coal seam in the Powder River Basin. These wells then pump out water trapped in the coal seam, reducing the pressure that keeps the CBNG in place. (This does not require pumping all the water out of the coal seam, which in fact would be counterproductive. Rather, it requires pumping only enough, and only as long as necessary, to allow the CBNG molecules to essentially disentangle themselves from the coal molecules and begin migrating up the well shaft. When the CBNG supply is captured, pumping ceases and recharge of the aquifer begins, reaching 80% to 90% of the original level in a relatively short time.) The CBNG is then trapped, transported by pipelines to a central collection point that serves a group of wells, and further transported and pressurized before introduction into the nationwide pipeline system.

Surface water in the Powder River Basin is always limited and often scarce, especially in high summer and drought years. Most of the sparse rural population in the area, primarily farmers and ranchers, obtain household drinking, cooking and bathing water, as well as all-important stock water, from these coal seams. This is the same water discharged from CBNG wells. It is plentiful and of high quality, suitable without modification for these human and livestock watering uses. However, some soils within the basin do not react well to certain characteristics of the CBNG water, and therefore it is not useful on all soils for irrigation purposes on a regular basis.[3] Consequently, regulation of

---

international in reach and some much smaller, have producing wells in Wyoming and plans for development in the Powder River Basin in Montana.

[3] The Electrical Conductivity ("EC") and Sodium Adsorption Ratio ("SAR") of the CBNG water from the Powder River Basin are generally

discharges of CBNG produced waters in excess of what local ranchers and farmers can use is necessary.

The Department of Environmental Quality ("DEQ") of the State of Montana regulates Fidelity's discharges of CBNG water in Montana. The DEQ has issued Fidelity a Montana Pollutant Discharge Elimination System ("MPDES") permit allowing it limited discharges of CBNG water into the Tongue River.[4] The Wyoming DEQ also regulates discharges of CBNG by Fidelity and other CBNG producers. Both states currently regulate CBNG produced water using narrative water quality standards approved by the United States Environmental Protection Agency ("EPA"). Both are also examining whether to translate those standards into numeric standards.

2. Northern Cheyenne Tribe CBNG Water Quality Regulations

The executive order that established the current boundaries of the Northern Cheyenne Reservation describes the eastern border as running down the middle of the channel of the Tongue River. Exec. Or., March 19, 1900. Even though there is no CBNG development on the Reservation and, so far as Fidelity knows, none is planned, in December 2001, the Northern Cheyenne Tribe ("Tribe") proposed water quality standards specifically aimed at limiting CBNG development. The Tribe asserts that its inherent sovereignty includes jurisdiction over the water quality of the Tongue River as it flows by the Reservation, which necessarily entails control

---

at levels which, if the water is used to irrigate certain clayey soils in the basin, over time may cause it to bind together, preventing some plants from absorbing it. Thus, the key constituents of concern are EC and SAR.

[4] This permit allows Fidelity to discharge no more than 1,600 gallons per minute ("gpm") of CBNG water into the river. This is roughly equivalent to the amount of water that flows through a typical garden hose.

over upstream dischargers, such as Fidelity and other CBNG producers in Wyoming. *See City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996). As demonstrated in this case, EPA supports that assertion of tribal jurisdiction.[5]

Fidelity and other interested parties submitted comments to the Tribe pointing out that their proposed water quality standards, particularly for EC and SAR, were unduly restrictive and threatened to not only prohibit further CBNG development in the upper portion of the Tongue River basin, but potentially inhibit production from Fidelity's small (250 wells) existing CBNG production in Montana.[6] In March 2002, the Northern Cheyenne Tribe responded to the comments by maintaining that its restrictive proposed water quality standards would not be changed. The Tribe plans to adopt its final water quality standards in June of this year.

The Tribe's stated purpose for promulgating the standards is to obtain Treatment as a State ("TAS") status from EPA under the Clean Water Act. 33 U.S.C. §§ 1251, *et seq.*, ("CWA"), specifically to promulgate enforceable water

---

[5] EPA's regulations, 40 C.F.R. §§ 131.3-131.9 (1996), App. 89a, in particular its anomalous construction of the exception to the general rule of *Montana v. U.S.*, 450 U.S. 544 (1981), that tribes generally lack jurisdiction over nonmembers, demonstrate this. *See* 56 Fed. Reg. 64, 876 *et seq.*, App. 93a. Its actions in approving tribal assertions of jurisdiction over navigable waters in this and other cases, *Albuquerque v. EPA*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997); *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998), leave no doubt EPA will agree with the tribe's assertion of jurisdiction over the Tongue River.

[6] From this small "play" in Montana, in the year 2001 Fidelity payed approximately $1.8 million in taxes and royalties to the State, most of which was returned to area counties, including Big Horn and Rosebud counties, which serve members of the Tribe as well as nonmembers. In Montana, and particularly in the affected counties, this is a significant sum, yet it is small compared to potential government revenues that could be derived from full development.

quality standards under section 303 of the CWA. When the Tribe receives TAS from EPA, the Tribe will be in a position to regulate and effectively prevent all CBNG development upstream of the Reservation, whether Montana and Wyoming, acting in their sovereign capacities, would allow the discharges necessary for such development or not.

SUMMARY OF ARGUMENT

More than twenty years ago, in holding that as a general principle tribes lack jurisdiction over nonmembers in *Montana v. United States*, 450 U.S. 544 (1981), the Court stated that it "defies reason" that Congress, when it authorized non-Indian homesteading and settlement on reservations, would have contemplated preserving tribal inherent sovereignty over non-tribal people and lands. *Id* at 559, n. 9. It equally "defies reason" that when Congress or the Executive established reservations they intended for those tribes to have inherent sovereign authority over navigable waters bordering, running through or on those reservations. Such a result necessarily subjects nonmembers, both on and off reservations, to tribal jurisdiction, and conflicts with the equal footing doctrine, (*see Pollard v. Hagen*, 44 U.S. (3 How.) 212 (1845); *Montana v. United States*, 450 U.S. 544, 551 (1981), citing *United States v. Holt State Bank*, 270 U.S. 49, 55 1926), and the federal balance of sovereign powers established in the Constitution.

Nevertheless, EPA has expansively interpreted and applied the "second *Montana* exception" to the general rule that Tribes lack jurisdiction over nonmembers so that, in its view, which the Court of Appeals upheld here, such jurisdiction includes power to control water quality of navigable waterways. This not only conflicts with this Court's clear jurisprudence on the subject [7] but also directly threatens the

[7] Since EPA promulgated its regulations in 1991, which as noted were even then out of step with this Court's decisions, the Court has been

sovereign power of states and the United States over not only their citizens but interstate commerce associated with such waterways. (In particular, *see South Dakota v. Bourland*, 508 U.S. 679 (1993), where the Court held a tribe lacked jurisdiction over navigable waters over land owned by the federal government; and *Montana*, *supra*, where the Court held that because the State of Montana owns the bed and banks of the Bighorn river under the Equal Footing Doctrine, the Crow tribe lacks jurisdiction over nonmember hunting and fishing on the river.) In short, EPA's position, and that of the Circuit Court below, assumes Tribes possess the territorial sovereignty this Court clearly held they lack, *Bourland, supra, Strate, supra,* placing Tribes in a position to negate the sovereign decisions, including interstate agreements, of states.

This, in turn, effectively disenfranchises states' citizens, on whose behalf states possess and use their sovereignty. *See* Article II, Section 1, Montana Constitution (1972): "All political power is vested in and derived from the people. All government of right originates with the people, is founded

---

consistent and clear about the limited scope and opportunity for tribal jurisdiction over nonmembers. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992)(Holding county has authority to impose certain taxes on fee land owned by Tribe, Court notes "very narrow" powers of tribes over nonmembers); *South Dakota v. Bourland*, 508 U.S. 679 (1993)(Applying *Montana*, Court held tribe lacked civil jurisdiction to regulate hunting and fishing by nonmembers on land and navigable waters owned by federal government within reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (Tribal court has no civil jurisdiction to hear tort action against nonmember arising from auto accident on highway located on easement over tribal land); *Atkinson Trading Co. Inc. v. Shirley*, 532 U.S. 645 (2001)(Tribe has no civil jurisdiction to tax nonmember for transaction on nonmember land); *Nevada v. Hicks*, ___U.S. ___, 121 S. Ct. 2304 (2001)(Tribal court lacks civil jurisdiction to hear civil suit against state fish and game officers who took actions against plaintiff on land owned by tribal member).

upon their will only, and is instituted for the good of the whole." It is no exaggeration to say that, if the Tribe's assertion of jurisdiction over the Tongue River succeeds and the Tribe thwarts CBNG development, then all the state's citizens will be deprived of the benefits of the sovereign decisions of the State to allow such development to go forward. This includes citizens in Dillon Montana, hundreds of miles from the site of the CBNG development, as well as those people in the directly affected counties.

Moreover, Montana's citizens, with the exception of those who are also members of the Northern Cheyenne Tribe, will be disenfranchised because, while the representatives they elected decided to pass laws and administer them in such a way so as to allow CNBG development, the Tribe, elected only by tribal members, will have been allowed to "trump" their decisions.

ARGUMENT

In fulfillment of their sovereign duties and exercising their sovereign powers, the states of Wyoming and Montana regulate the CBNG industry, which is at this time in its infancy in the Powder River Basin. Anticipating the full development of this industry and the introduction of Powder River Basin CBNG into the national energy mix, Wyoming and Montana have engaged in a great deal of environmental assessment and planning for the numerous wells that would be required to fully exploit this resource. (The Montana Statewide Oil and Gas EIS, issued in draft for public comment December 4, 2001, has the Montana Board of Oil & Gas, the DEQ and the BLM as co-lead agencies. A similar effort is taking place concurrently for that part of the Powder River Basin in Wyoming.) In this effort, they have been working with the federal government, primarily through the Bureau of Land Management ("BLM"). *Id.*

Each state has already benefitted from and anticipates far more financial benefit from the development of CBNG in the Powder River Basin in the form of royalties and tax revenues. CBNG development in Wyoming is ahead of such development in Montana and has by some estimates contributed tens of millions of dollars in the last ten years to the state and local coffers. In Montana, it is estimated that full development of the CBNG resource will produce up to $4 billion in state and local taxes over the next 20 years. *Coal Bed Methane Development, Powder River Basin of Montana: Economic and Social Impacts of Proposed Development*, prepared by Anderson ZurMuehlen & Co., P.C., March 30, 2001.

To regulate this development and anticipate and resolve any conflicts in the use of the relevant resources, most prominently the Tongue River, that may arise from such regulation, Montana and Wyoming have been in discussions for over a year. In August 2001, the two states entered an interim agreement regarding the use of the Tongue River's assimilative capacity and the use of the Tongue River basin for discharges of CBNG produced waters. This interim agreement is at this time the subject of further discussions between the Governors of Montana and Wyoming to arrive at some permanent agreement both as to regulatory measures relating to CBNG development, particularly the disposal of produced water, and sharing the resources and capacities of the Tongue River basin.

As of this date, the Northern Cheyenne Tribe has not yet submitted an application to receive TAS. Nevertheless, that is their stated intention and EPA's regulations virtually dictate that EPA will find the Northern Cheyenne Tribe qualified to receive treatment as a state. Under EPA's interpretation of *Montana v.* U.S., *supra*, and subsequent case law as upheld by the Court of Appeals in this matter, this

means that EPA will find the Tribe possesses inherent sovereignty to regulate water quality matters for the Tongue River.

This places the Northern Cheyenne Tribe in a position to thwart the sovereign decisions of the states of Wyoming and Montana, and in fact, the United States of America, whose national energy plan has development of the Powder River Basin CBNG as a key component. The Petitioner clearly explained how this consequence flows directly from EPA's erroneous interpretation of the second exception to the general rule of *Montana v. U.S., supra.* While EPA's expansive interpretation of that exception appeared overbroad when it promulgated its regulations in 1991, the decisions of this Court in the intervening decade expose it as untenable and in clear conflict with the controlling law on the scope of tribal inherent sovereign authority.

Finally, and perhaps most significantly, the 7th Circuit's decision and EPA's application of *Montana v. U.S.* also essentially disenfranchise the citizens of states whose sovereign decision-making is subject to control by tribes given TAS by the EPA. The citizens of Montana and Wyoming, for example, which include tribal members, elected representatives to make policy choices, and in Montana and Wyoming, those representatives elected to allow CBNG development as regulated by their appropriate state agencies. The states have made sovereign choices to enter agreements between each other as to how they will regulate the industry and apportion the impact the industry may have in each state on the Tongue River. Allowing the Tribe to act as a "choke point" on the Tongue River would, as a practical matter, negate all these decisions.

Neither the CBNG industry in the Powder River Basin, including Fidelity, as business interests, nor the states of Montana and Wyoming, as sovereigns, are unique in finding themselves under EPA's policies subject to tribal jurisdiction.

Considering the effects of the extension of EPA's TAS program for water quality matters throughout the country reveals the importance of reviewing the Court of Appeals' decision.

For example, if EPA's interpretation of *Montana* stands, and tribes possess inherent sovereign authority over navigable waters either on or bordering their reservations, the Colorado River above the Navajo Reservation, primarily in Arizona, would be subject to the Navajo Tribe's standards; the Missouri River above the Fort Peck Reservation in eastern Montana would be subject to the Fort Peck Tribes' standards; and the Missouri would also be subject to the standards promulgated by tribes on the Fort Berthold Reservation in North Dakota, and the Standing Rock, Cheyenne River, Lower Brule, Crow Creek, and Yankton reservations in South Dakota; the Arkansas River above the Osage Reservation in Oklahoma would be subject to that Tribe's standards; the Columbia River above the Colville Reservation in Washington would be subject to that Tribe's standards, and so on.

This situation not only conflicts with but threatens the federal balance of sovereignty established in the Constitution and the individual rights it protects.

CONCLUSION

The *amicus* respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted.

JON METROPOULOS *
GOUGH, SHANAHAN,
JOHNSON & WATERMAN
P. O. Box 1715
Helena, MT 59624
(406) 442-8560

* Counsel of Record

Counsel for Amicus Curiae